UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST LITIGATION	)	
	)	Misc. No. 99-197 (TFH)
	)	MDL No. 1285
THIS DOCUMENT APPLIES TO: ALL ACTIONS	)	

FILED
NOV 3 0 2001
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER Re: Deposition Locations

Upon consideration of the Rule 53 Objections and the associated discovery motions of the parties pending before the Court, the parties' briefs, the Special Master's Reports, the argument presented at the November 14, 2001 hearing, and the entire record herein, it is hereby

ORDERED that the Special Master's Report and Recommendation of September 10, 2001 is **AFFIRMED**; Specifically, it is hereby

ORDERED that the plaintiffs' August 3, 2001 motion to compel is **GRANTED**. Each defendant subject to the motion must produce for deposition their 30(b)(6) witnesses and up to six officers, directors, and managing agents in Washington, D.C., or *other such location in the United States as may be agreed upon by the parties*, provided that plaintiffs shall reimburse defendants for the reasonable costs for deponents' travel to the United States to attend the depositions. It is further hereby

ORDERED that the Special Master's Report and Recommendation of November 9, 2001 is **AFFIRMED IN PART**; Specifically, it is hereby

ORDERED plaintiffs' October 12, 2001 motion for relief pursuant to Rule 37(D) to set Takeda Depositions is **GRANTED IN PART**; and, it is further hereby

ORDERED that the previously noticed Rule 30(b)(6) depositions of defendants Takeda

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Vitamin & Food, USA, Inc. ("TVFU") and Takeda Chemicals Industries, LTD. ("TCI") take place in Washington, D.C., *or other such location in the United States as may be agreed upon by the parties* within 14 days of this memorandum opinion and order, provided that plaintiffs shall reimburse defendants for the reasonable costs for deponents' travel to the United States to attend the depositions; and, it is further hereby

ORDERED that the Court reserves ruling at this time on plaintiffs' motion for an award of attorneys' fees incident to the October 12, 2001 discovery motion; and, it is further hereby

ORDERED that Takeda defendants' cross-motion for a protective order is **DENIED.**

SO ORDERED.

November 30, 2001

Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST LITIGATION	)	
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MEMORANDUM OPINION Re: Deposition Locations

Pending before the Court are (1) Defendants' Rule 53 Objections to the Special Master's September 10, 2001 Report and Recommendations Respecting Plaintiffs' Motion to Compel Foreign Defendants to Produce Rule 30(b)(6) Witnesses and Officers, Directors and Managing Agents for Depositions in the United States ("September 10 Report"), and, (2) Defendants' Rule 53 Objections to the Special Master's November 9, 2001 Report and Recommendation Respecting Plaintiffs' Motion for Relief Pursuant to Rule 37(D) to Set Takeda Depositions and Defendants' Cross-Motion for a Protective Order ("November 9 Report").[1] The dispute at issue in both the September 10 Report and the November 9 Report is the location of 30(b)(6) depositions for certain foreign defendants.

Upon careful consideration of the parties' briefs, the Special Master's Reports, the argument presented at the November 14, 2001 hearing, and the entire record herein, the Court

[1] The Court recognizes that Defendants Takeda Vitamin & Food, USA, Inc. ("TVFU") and Takeda Chemicals Industries, LTD. ("TCI") (together "Takeda") were not subject to the plaintiffs' August motion to compel because, at that time, the parties were in agreement as to the location of Takeda 30(b)(6) depositions. The agreement failed however when parties began to negotiate dates and ultimately the plaintiffs' filed the October 12 motion. In its Rule 53 Objection to the Special Master's November 9 Report, Takeda joined the pending Rule 53 Objection to the September 10 Report. The underlying discovery motions to both the September 10 and November 9 Report's of the Special Master focus on the same issue, therefore, they will be analyzed here together.

adopts the reasoning of the Special Master's September 10, 2001 and the November 9, 2001 Reports and upholds, in part, his recommendations. As such, the Court grants the plaintiffs' August 3, 2001 motion to compel and orders that each defendant subject to the motion must produce for deposition their 30(b)(6) witnesses and up to six officers, directors, and managing agents in Washington, D.C., or other such location in the United States as may be agreed upon by the parties, provided that plaintiffs reimburse defendants for the reasonable costs for deponents' travel to the United States to attend the depositions.

In addition, the Court grants in part the plaintiffs' October 12, 2001 motion and orders that the previously noticed Rule 30(b)(6) depositions of Takeda defendants take place in Washington, D.C., or other such location in the United States as may be agreed upon by the parties within 14 days of this memorandum opinion and order, provided that plaintiffs reimburse defendants for the reasonable costs for deponents' travel to the United States to attend the depositions. The Court, however, reserves ruling, pending further developments, on plaintiffs request for an award of attorneys' fees and costs associated with the October 12, 2001 motion. The Court also denies Takeda defendants' cross-motion for a protective order.

Background

On June 20, 2001, this Court approved narrowed merits to be taken under the Federal Rules of Civil Procedure, and denied the foreign defendants' motion for a protective order requiring plaintiffs to conduct discovery under the Hague Convention or other applicable laws and treaties. Following more than a month of negotiation, the parties could not reach a mutually

agreeable location for defendants' 30(b)(6) witnesses.[2] The plaintiffs' August 3, 2001 motion to compel followed.

On August 15, 2001, after fully briefing the matter, the parties presented oral argument before the Special Master. On September 10, 2001, the Special Master filed his Report and Recommendations finding that special circumstances exist for ordering that depositions take place in the United States rather than at the foreign defendant's principal places of business. Specifically, the Special Master recommended that plaintiffs' motion be granted and that each of the foreign defendants subject to the motion be ordered to produce for deposition in Washington D.C., or such other location in the United States as may be agreed upon, their Rule 30(b)(6) witnesses and up to six officers, directors, and managing agents, provided that plaintiffs reimburse defendants for the reasonable costs of deponents' travels to the United States to attend the depositions.

The Special Master found that although a corporate defendant's 30(b)(6) depositions are normally taken at its principal place of business, courts have discretion to set the location should a dispute arise and special circumstances. He analyzed whether special circumstances exist by considering four factors: (1) expense and burden; (2) supervision of depositions; (3) legal and procedural impediments in Japan, Germany, and France; and, (4) potential affront to sovereignty. On the facts of this case, the Special Master found that each factor weighed in favor of setting the

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[2] The Court accepts the account of this negotiation as described in the September 10 Report. Briefly, the plaintiffs offered to limit who would be deposed in the United States to defendants' 30(b)(6) witnesses and 6 officers, directors, and managing agents per foreign defendant (as identified from defendants' responses to Interrogatory 5(B)); depositions of individuals who are not officers, directors, and managing agents would be held in a mutually agreeable location. This offer was rejected by defendants, insisting instead that depositions be taken where each deponent resides. See September 10 Report at 2-3.

depositions in Washington, D.C. or other location in as may be agreed upon in the United States. The defendants' Rule 53 objections followed.

While the Rule 53 Objections to the September 10 Report were pending the negotiations between plaintiffs and defendants Takeda concerning the date and location for Takeda's 30(b)(6) depositions failed. On October 12, 2001, plaintiffs filed a motion to set the location and dates, and on October 23, 2001, Takeda filed a cross-motion for a protective order. The matter was heard before the Special Master who issued his report and recommendation on November 9, 2001. The report was based on his earlier recommendations in the September 10 Report. In the report, the Special Master found that Takeda had not established good cause warranting the issuance of a protective order pursuant to Rule 26(c), and had not introduced any additional facts or case law warranting a different outcome from the September 10 Report in setting the 30(b)(6) deposition locations.

This Court heard defendants' objections to the September 10 Report on November 14, 2001 and at that hearing ordered defendant Takeda to promptly file its objections to the November 9 Report. The underlying discovery motions to both the September 10 and November 9 Reports of the Special Master focus on the same issue and thus they will be analyzed here together.

In their Rule 53 Objections, defendants argue that setting the location of the foreign defendants' 30(b)(6) witnesses in Washington, D.C. or other U.S. location contradicts (1) what defendants argue amounts to a course of dealing which established that depositions will occur in the location most convenient for the deponent, and, (2) the "general rule" that absent exceptional circumstances, depositions of a corporate defendant should take place at the corporation's

principal place of business. Additionally, defendants argue that deponents should not be compelled to travel to the United States in light of the safety concerns raised by the tragic events of September 11, 2001.

Discussion

The defendants' course of dealing objection is without merit and deserves little attention. In fact, Rule 29 specifically authorizes and encourages parties to negotiate discovery disputes outside the court, however, when negotiations break down the court can serve as a backstop for resolving disputes.[3] While this Court continues to encourage parties to set depositions in mutually agreeable locations, the past practices in this case do not establish a rule that determines that the location of depositions especially when, as here, a dispute has arisen.

The defendants' second objection also fails.[4] Defendants argue that the Special Master's recommendation is contrary to the "general rule" of deposing corporate defendants at the defendant's place of business. Defendants argue that the Special Master conducted an improper *ad hoc* weighing of factors when case law clearly calls for a presumption that the deposition be held at the unless circumstances provide otherwise. Defendants cite the following footnote from

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[3] Rule 29 "Stipulations Regarding Discovery Procedure" states, in pertinent part, that "[u]nless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice...." Fed.R.C. P. 29.

[4] Not only does this argument fail on the merits but the Defendants have not brought to light any new arguments that were not heard and decided by the Special Master. While the Court does not deny the Defendants' right to appeal a discovery ruling by the Special Master pursuant to Rule 53, simply re-hashing the same arguments without more could be construed as a strategy of delay. The Court is seriously concerned about the continued discovery delay in this case. In light of this and the pending discovery deadline, the Court urges parties to work together to resolve these disputes without the intervention of the Court.

a D.C. District Court opinion to support their argument:

> The universally accepted rule in federal litigation is that, in the absence of special circumstances...a party seeking discovery must go where the desired witnesses are normally located. . . Absent exceptional circumstances, the deposition of a defendant corporation by its agents and officers should ordinarily be taken at its principal place of business.

Work v. Bier ("Work II") 107 F.R.D. 789, 793 n.4 (D.D.C. 1985). Defendants argue that although the Special Master noted the general rule and the "exceptional circumstances" test, he made his decision based on a balancing exercise and never actually applied the test.

Defendants contend that the Court should adhere to the general rule because there are no exceptional circumstances in this case. Defendants' argument relies primarily on Work II[5] which does support the proposition that a corporate defendant's 30(b)(6) depositions are normally taken at its principal place of business. The defendants' argument founders, however, in failing to fully acknowledge the significant discretion that courts have in setting the location of depositions when disputes arise depending on the circumstances. See e.g., Fin. Gen Bankshares, Inc. v. Lance, 80 F.R.D. 22, 23 (D.D.C.1978) (holding that the location of depositions of defendants "ultimately is within the discretion of the Court, and instances of defendants having to appear for depositions at the place of trial are not unusual"); 7 Moore's Federal Practice § 30.20[1][b][ii]; 8A Charles Alan Wright *et al.*, Federal Practice and Procedure § 2112, at 74-75, 81 (2d ed. 1994)

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[5] The Special Master was not persuaded by defendants attempts to distinguish the caselaw requiring defendants to travel to the United States for depositions. Defendants cite cases which they claim support their contention, but which are easily distinguishable. See e.g., Custom Form, 196 F.R.D. at 336-37; In re Honda, 168 F.R.D. 535; McKesson Corp., 185 F.R.D. 70; and M & C Corp. v. Erwin Behr GambH & Co., 165 F.R.D. 65 (E.D. Mich. 1996). September 10 Report at 9, n.16. The Court adopts this analysis.

("[t]he deposition of a corporation by its corporate agents and officers should ordinarily be taken at its principal place of business," but, "[o]n a motion the court has wide discretion in selecting the place of examination," and "the particular facts of each case will determine the selection of a place"); see also Naartex Consulting Corp. v. Watt, 722 F. 2d 779, 788 (D.C. Cir. 1983) (stating that under the Federal Rules a district court has broad discretion in resolving discovery problems in cases pending before it). Moreover, there are numerous cases in which courts have ordered depositions of foreign defendants in the U.S. rather than at the defendant's principal place of business. See e.g., Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir. 1994) (upholding a district court's order that depositions of Hong Kong Corporations be taken in San Francisco); McKesson, 185 F.R.D. 70, 80-81 (D.D.C. 1999) (ordering depositions of foreign nationals Washington D.C. rather than in Iran or the Hague); Fin Gen. Bankshares, 80 F.R.D. at 23 (ordering depositions of foreign defendants to be taken in Washington D.C.); Custom Form Mfg., Inc. v. Omron Corp.., 196 F.R.D. 333, 336-37 (N.D. Ind. 2000) (ordering depositions in Illinois rather than Japan); In re: Honda Am. Motor Co., 168 F.R.D. 535 (ordering depositions in Baltimore, rather than Japan). Thus, case law and treaties reflect the fact that courts have discretion to set the location for a deposition of a foreign corporate defendant.

Defendants go on to argue that the Special Master erred in analyzing four factors to determine whether special circumstances exist to justify setting the location of the depositions in the United States rather than at the principal places of business of the foreign defendants. The Special Master viewed these factors as fleshing out the concept of "special circumstances."[6] The

[6] The Special Master notes that not every case addressing the issue of deposition location addresses every factor. See September 10 Report at 8, n. 10.

four factors analyzed are: (1) the burden to the parties of holding the depositions in the United States relative to the burden of holding the depositions abroad, including the burdens imposed on the witnesses and parties' counsel; (2) the court's ability to supervise depositions in the contested location; (3) whether depositions would be impeded by any legal or procedural barriers in another nation; and (4) the potential affront to the sovereignty of a foreign nation if a deposition pursuant to the Federal Rules of Civil Procedure is held within its borders.

The Court finds no merit to the defendants' objections to the Special Master's analysis of each of the factors and adopts the reasoning of the Special Master as to each factor. First, the burden factor weighs in favor of ordering the depositions to take place in the United States given the number of parties and attorneys actively involved in this litigation and the number of defense attorneys with offices in or easily accessible to Washington, D.C. There are efficiencies to be gained by ordering the depositions to be here which outweigh the burdens imposed by requiring the defendants' 30 (b)(6) witnesses and managing agents to miss work because of travel time. The disruption to the defendants businesses is likely to be minimal as the number of 30(b)(6) depositions is limited and the duration is likely to be short if the right against self-incrimination is invoked by the deponents. Second, the supervision of depositions factor also weighs in favor of taking the depositions in the United States. As the Master notes the parties are under a time constraint as the deadline for completion of merits discovery looms.[7] This litigation has been lengthy and zealous. Discovery in this case has been delayed for almost two years as issues requiring judicial intervention continue to arise. The Court anticipates disputes requiring judicial

[7] Pursuant to this Court's July 28, 2001 Scheduling Order, fact discovery must be completed by February 11, 2002.

intervention during these depositions. Conducting these depositions in Washington would aid the Court in promptly resolving these disputes.[8]

The third factor analyzed concerns the potential legal and procedural impediments in foreign countries - specifically, Japan, Germany, and France.[9] The Court adopts the analysis of the Special Master with respect to each of these countries and concludes that significant legal and procedural impediments do exist which may hamper taking the depositions under the Federal Rules.

The Court will not rely on the "practical experience" of various counsel and court reporters who have participated in Federal Rules depositions in Germany and France, to order Federal Rules depositions to proceed where there is evidence that suggests this is either contrary to German and French law or may further delay discovery by requiring significant additional procedures. Without deciding to a factual certainty whether the foreign defendants' 30(b)(6) depositions could be taken in France or Germany without interference, the Court affirms the Special Master's reasoning and finds sufficient evidence to suggest the practice may be unlawful or at least may cause additional delay. See September 10 Report at 16-23. Further, the defendants argument that essentially boils down to "it happens all the time" in France and Germany is unpersuasive in light of the uncertainty as to whether such depositions may be taken without interference.

As to Japan, it is undisputed that lawful Federal Rules depositions could be taken at the

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[8] Even if parties agree to take the depositions in a location in the United States other than in Washington, D.C., it is less likely that time zone issues pose a significant problem.

[9] The September 10 Report also discussed Switzerland, however, it is not disputed that Federal Rules depositions are prohibited in that nation. See September 10 Report at 23.

U.S. Consulate or Embassy. See September 10 Report at 15-16. While the detailed requirements for taking depositions there may present a sizeable procedural impediment, the size and availability of rooms is perhaps more of an impediment given a case of this size (the largest room holds 20) and the time line under which the parties must proceed.[10]

In sum, the Court is satisfied that sufficient legal and procedural impediments, as identified by the Special Master in the September 10 Report and summarized here, exist in France, Germany, and Japan which weigh against setting 30(b)(6) depositions of foreign defendants within the territory of those countries. Additionally, this Court has repeatedly made it clear that this case requires timely and efficient responses to discovery. Therefore, on the facts of this case, this factor weighs in favor of setting the location in Washington, D.C. or a mutually agreed upon location in the United States

The fourth factor examined - sovereign interests and comity - also weighs in favor of setting the depositions in the United States. Taking Federal Rules deposition testimony abroad does pose a potential affront to a foreign nation's sovereignty. The Court must make every effort to minimize these potential affronts to foreign nations' sovereignty by affording proper weight to comity issues. See Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 546 (1987). Accordingly, the Special Master found that taking the 30(b)(6) depositions in the United States rather than in the foreign countries would minimize comity and

[10] Takeda, in its cross-motion for a protective order and subsequent Rule 53 Objection to the November 9 Report, has not provided the Court with any new facts or case law which would warrant a different balance with respect to setting the location of the depositions in Japan. In fact, Takeda, relies primarily on the arguments made by foreign defendants in the Rule 53 Objection to the September 10 Report which the Court finds unpersuasive. See Takeda Defendant's Letter Brief, Nov. 16, 2001 at 5.

sovereignty issues. See September 10 Report at 23-24 (citing McKesson, 185 F.R.D. at 81 (ordering deposition in the United States to avoid infringement on Iran's sovereignty); In re: Honda, 186 F.R.D. at 538 (D.M.D. 1996) (stating that taking depositions of foreign nationals in the United States does not implicate comity concerns)). Therefore, this factor too weighs in favor of requiring the foreign defendants' 30(b)(6) depositions be conducted in the United States. Taken together, the four factors analyzed by the Special Master suggest that on the facts of this case, special circumstances do exist justifying this Court in setting the location of the depositions in Washington D.C. or other U.S. location.

The defendant's last argument in the Rule 53 Objections, vociferously set forth in Takeda's Objection, concerns the terrorist attacks of September 11, 2001 in the United States, and the national and world events following the attacks. There is no dispute that the United States and other parts of the world are more dangerous now than was understood before September 11, 2001. The Court understands that individuals and corporations are more concerned about safety particularly with respect to air travel, and that many corporations have even restricted travel to particular cities in the United States.[11] The courts of the United States, however, are open and these world events do not change the obligations of the foreign defendants with respect to this litigation. This objection also fails.

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[11] There is no evidence that all travel to the United States has been banned, in fact, Takeda Defendants have revised the travel restrictions to the United States as of October 19, 2001. As of that date, it prohibited its employees to travel to Washington, D.C., New York, New Jersey, and Florida, but permitted travel to other parts of the United States if the trips are absolutely necessary. See September 10 Report at 8. The Defendants are multinational corporations embroiled in litigation involving a global conspiracy to fix prices - their obligations to this Court continue subject to default. It is hard to imagine that travel pursuant to this litigation would not be construed as absolutely necessary.

As previously stated, the Rule 53 Objections to the September 10 and November 9 Reports are analyzed together as they both address the issue of deposition location. Defendants Takeda, however, did file a cross-motion for a protective order pursuant to Rule 26(c) which the Court will briefly address. The Court denies this motion for substantially the same reasons as stated in the Special Master's November 9 Report. As Takeda accurately points out in its November 16, 2001 Letter Brief, Rule 26 authorizes the Court to enter an order specifying the "terms and conditions" if depositions, including a "designation of time or place" upon "good cause shown." Fed. R. Civ. P. 26(c)(2). Takeda relies primarily on the tragic events of September 11, 2001 and the resulting travel difficulties to establish good cause. As just discussed, the September 11 attacks and the aftermath have resulted in understandable fear and concern, however, this does not constitute good cause sufficient to warrant the issuance of a protective ordering prohibiting the Takeda 30(b)(6) depositions in the United States. The Special Master's November 9 Report regarding this issue is well-reasoned. Takeda's cross-motion for a protective order is therefore denied.

Conclusion

For the foregoing reasons, the Court substantially affirms the recommendations of the Special Master in the September 10 and November 9 Reports, however, at this time the Court reserves ruling on the Plaintiffs request for an award of attorneys fees associated with their October 12, 2001 motion. The Court finds that there are special circumstances in this case which justify deviation from the normal practice of setting the 30(b)(6) of corporate defendants' at the principal places of business. As the location of theses depositions is ultimately within the discretion of this Court, the foreign defendants' 30(b)(6) depositions shall be taken in

Washington, D.C. or other location in the United States in accordance with the accompanying Order. The Court, therefore, will: (1) grant plaintiffs' August 3, 2001 motion to compel and order that each defendant subject to the motion must produce for deposition their 30(b)(6) witnesses and up to six officers, directors, and managing agents in Washington, D.C., or other such location in the United States as may be agreed upon by the parties, provided that plaintiffs reimburse defendants for the reasonable costs for deponents' travel to the United States to attend the depositions; (2) grant in part the plaintiffs' October 12, 2001 motion, and order that the previously noticed Rule 30(b)(6) depositions of Takeda defendants take place in Washington, D.C., or other such location in the United States as may be agreed upon by the parties within 14 days of this memorandum opinion and order, provided that plaintiffs reimburse defendants for the reasonable costs for deponents' travel to the United States to attend the depositions, however, the Court reserves ruling on plaintiffs request for an award of attorneys' fees and costs associated with the motion; and, (3) deny Takeda's cross-motion for a protective order.

November 30th, 2001

Thomas F. Hogan
Chief Judge